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Pleading and Practice--Limitations of Actions--The Statute of Limitations as Affects Amended Pleadings (Harriss v. Tams, 258 N.Y. 229 (1932))

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unwarranted. Unsuccessful litigants have urged it as new grounds for appeal and defendants have invoked it to bring in new parties to share their burden of liability.[6] It has been sought to extend the application of the law to add defendants and now to prevent their release although there is no evidence to warrant a judgment against them. The error lay in attempting to create a situation to fit the law instead of applying it only when all the conditions are present. It is essential that "a judgment recovered jointly against two or more defendants * * * has been paid by one or more defendants." The plaintiff's case must be closed and his judgment collected. Contribution between joint tort-feasors is a gift of the legislature by statute and this statute derogatory of the common law[7] must be strictly construed and strictly complied with before the right comes into existence. This decision properly construes the statute by giving it a limited application, and again states the opinion of the court that it does not affect any other section relating to the parties to actions.

J. M. C.

PLEADING AND PRACTICE—LIMITATIONS OF ACTIONS—THE STATUTE OF LIMITATIONS AS AFFECTS AMENDED PLEADINGS.—Plaintiff sued defendants for the purchase price of a motorboat on defendants' misrepresentation as to its speed. On the trial plaintiff learned of its error in not suing defendants as agents for breach of authority of warranty and asked leave to amend its complaint to include this cause of action. Both alleged causes of action arose in 1919 and the trial was held in 1930. *Held,* The trial court had discretion in permitting the plaintiff to amend his complaint, but the amendment, constituting a new cause of action, was subject to the bar of the statutory period and defendants had the right to interpose that defense. *Harriss* v. *Tams,* 258 N. Y. 229, 179 N. E. 476 (1932).

An action lies against an agent for misrepresentation of authority to warrant concerning his principal's goods.[1] If the agency is

[6] For an exhaustive study of this section and the cases relating to it see Rothschild, *Contribution Between Tort-Feasors* (1931) 6 ST. JOHN'S L. REV. 1.

[7] 1 WILLISTON, CONTRACTS (1924) §345.

[1] Moore v. Maddock, 251 N. Y. 420, 167 N. E. 572 (1929); 1 WILLISTON, CONTRACTS (1920) §282: "* * * if on a fair construction of the contract it appears that the intent was to bind the principal only, according to the better view the agent is liable, not on the contract, but on an implied warranty of his authority based on his representation of authority"; TIFFANY, AGENCY (2d ed. 1924) §130. As to liability on a negotiable instrument when unauthorized see New Georgia National Bank v. Lippman, 249 N. Y. 307, 164 N. E. 108 (1928) interpreting §39 of the N. Y. NEGOTIABLE INSTRUMENTS LAW to mean that the agent is liable as a principal on the note.

not disclosed to the third party the agent may be held as a principal.[2] Where, however, the agency is disclosed, as in the instant case, the third party's remedies consist, usually, in suing the agent for breach of warranty of authority or, of rescinding the contract as concerns the principal, offering to return the goods and then suing for the purchase price which is the principal's. The principal may not retain the proceeds of a contract tainted with the fraud or misrepresentation of the agent.[3] Mere retention of the proceeds does not constitute an approval or ratification of the agent's unauthorized acts [4] unless it be inconsistent with any other theory.[5] The period of limitation for an action on a simple contract in this jurisdiction is six years.[6] Actions commenced after the statute has run may be effectively barred by the defense of the Statute of Limitations [7] and complaints which show this to be so may be dismissed without the necessity of awaiting trial.[8] Where a complaint apprises the defendant of the wrong done and is lacking in some detail, necessary,

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[2] Ludwig v. Gillespie, 105 N. Y. 653, 11 N. E. 835 (1887); 1 WILLISTON, *supra* note 1, §284.

[3] See Bennett v. Judson, 21 N. Y. 238 (1860); Smith v. Tracy, 36 N. Y. 79 (1867); Baldwin v. Burrows, 47 N. Y. 199 (1872); American National Bank v. Wheelock, 82 N. Y. 118 (1880); Deyo v. Hudson, 225 N. Y. 602, 122 N. E. 635 (1919). This is so where the injured parties' action is in rescission. Where, however, it is for fraudulent misrepresentation and the acts are unauthorized no recovery is allowed. Freedman v. New York Telephone Co., 256 N. Y. 392, 176 N. E. 543 (1931). A different rule applies as to bank tellers, The Farmers' and Mechanics' Bank of Kent County, Md. v. The Butchers' and Drovers' Bank, 16 N. Y. 125 (1857) and freight agents, Bank of Batavia v. New York, Lake Erie and Western Railroad Company, 106 N. Y. 195, 12 N. E. 433 (1887).

[4] Baldwin v. Burrows, *supra* note 3 at 213: "The mere fact that the proceeds of the contract made by one person in the name of another without authority, or a portion of them have come to the hands of the latter, is not, of itself, sufficient to render him liable on the contract."

[5] *Ibid.*: "To have that effect, the proceeds must be received not only with the knowledge, but under such circumstances as to constitute a voluntary adoption of the contract."

[6] N. Y. C. P. A. §48: "Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued: 1. An action upon a contract obligation or liability express or implied, except a judgment or sealed instrument."

[7] Finkelstein and Bergman, *Limitations of Actions in Equity in New York* (1931) 5 ST. JOHN'S L. REV. 199: "The unfairness of permitting a cause of action to be held forever as a sword over the head of the debtor or his descendants was * * * early perceived and a great body of law has arisen that deals with the practical application of these periods of limitation to actual cases. Here the requirements of strict justice must give way to practical necessities, for it is obvious that if six years is the period of limitation for a particular action, a suit which may be brought on the last day of the sixth year will be forever barred if it is not brought until the first day of the seventh year."

[8] In New York, under Civil Practice Rule 107, the defendant may move within twenty days after the service of the complaint to procure a judgment dismissing the complaint or one or more causes stated therein where, among other things, it appears that the cause or causes did not accrue within the time limited by law for the commencement of an action thereon.

but a part of the cause stated in the complaint, the trial court may, in its discretion permit an amendment to the complaint even though at the time of the amendment the addition of another distinct and separate cause be barred by the running of the statute.[9] The problem in every case is to determine what constitutes an enlargement of the cause stated in the original complaint and what constitutes a new and distinct cause.[10] The court in the instant case declines to set forth a definite test by which one may measure. "Perhaps to some extent the determination must be made pragmatically, based on considerations of fairness." [11] The tendency is toward liberality,[12] and not without justification.[13] It is sufficient, at this time, to note that in the case at hand the court is of the opinion that there is a substantial difference between suing a defendant in the capacity of principal [14] and subsequently seeking to amend the complaint to hold the defendant as an agent on the theory of breach of warranty of authority, after the six-year period had elapsed. It will be interesting to note what effect this decision will have on future pronouncements of the court.

A. K. B.

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[9] Seaboard Air Line v. Renn, 241 U. S. 290, 36 Sup. Ct. 567 (1916), citing Texas and Pacific Ry. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905 (1892); Atlantic and Pacific R. R. v. Laird, 164 U. S. 393, 17 Sup. Ct. 120 (1896); Hutchinson v. Otis, 190 U. S. 552, 23 Sup. Ct. 778 (1903); Missouri Kansas & Texas Ry. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135 (1913); Crotty v. Chicago, Great Western Ry. Co., 169 Fed. 593 (C. C. A. 8th, 1909). See, also, Dietz v. Harris, 221 App. Div. 581, 224 N. Y. Supp. 491 (1st Dept. 1927).

[10] Luce v. New York C. and St. L. R. R. Co., 213 App. Div. 374, 211 N. Y. Supp. 784 (4th Dept. 1925), *aff'd*, 242 N. Y. 519, 152 N. E. 409 (1926); Miller v. Erie R. R. Co., 109 App. Div. 612, 96 N. Y. Supp. 244 (2d Dept. 1905).

[11] Instant case at 243, 179 N. E. at 482.

[12] Seaboard Air Line v. Renn, *supra* note 10.

[13] It is important, of course, that the defendant be apprised of the nature of the wrong of which the plaintiff complains. But once having been apprised of it, he should not be permitted to avail himself of a technicality to defeat the claim set forth substantially by the plaintiff. Where the plaintiff has neglected to set forth the essential elements of a wrong done, or, having commenced his action as one for malicious prosecution, he subsequently elects to sue for slander, Dietz v. Harris, *supra* note 10, he should be bound by the statute as to the second cause, as constituting an entirely independent plea. But where, as in Seaboard Air Line v. Renn, *supra* note 10, plaintiff stated that he was injured by reason of the defendant's negligence, stating the nature and course of events, without stating specifically that the defendant was engaged in interstate commerce, it was proper to allow him to amend the complaint to include that information.

[14] The court ordered a new trial intimating that plaintiff might recover upon an obligation, assumed by defendants arising from the warranty concerning the speed of the boat and which was stated imperfectly in the original complaint.